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SUPREME COURT, U.S.
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No. 04-1054

IN THE
Supreme Court of the United States

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner.

v.

TERESA B.,
Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Maryland

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY ARGUMENT

The arguments raised by the respondent, Teresa B., do not warrant denial of the petition because this case presents a live controversy involving an important question of federal constitutional law, which has yet to be answered by this Court but has led to different results in States where the issue has arisen.

A. This Case Satisfies The Justiciability Requirements For An Appeal Arising From A State Appellate Court Under *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), And Is Not Moot.

Contrary to the respondent's suggestion, this case continues to present a live controversy that is not moot.

1. This Is A Live Justiciable Case Or Controversy.

As this Court has held, a case that arises from a State appellate court decision on a question of federal law "constitutes a cognizable case or controversy" where, as here, (1) "parties remain adverse," (2) "'valuable legal rights . . . will be directly affected to a specific and substantial degree by the decision of the question of law'" presented in the petition, and (3) the proceedings below "were judicial in nature, and resulted in a final judgment altering tangible legal rights," which was not "an abstract determination" rendered by the State court on "an uncertain or hypothetical state of facts." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 619 (1989)(citations omitted). This case fully satisfies these requirements for justiciability.[1]

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[1]The petitioner also must have "standing to invoke the authority of this Court," *ASARCO*, 490 U.S. at 619, which Teresa B. has not challenged. Here, as in *ASARCO*, the petitioner has standing because the state court proceedings ended in "an adjudication of legal rights" which is "the kind of injury cognizable in this Court on review from the state courts;" the petitioner contends the decision below "rests on an erroneous interpretation" of federal law; and this Court's "reversal of the decision below would remove its disabling effects" upon the petitioner. *Id.* at 618-19.

First, the parties to the proceeding below "remain adverse," *id.* at 619, as evidenced by the State's petition and the Brief in Opposition filed on behalf of Teresa B. seeking to prevent this Court from granting review that might invalidate the favorable judgment she obtained below. *See Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 125 S. Ct. 1517, 1526 n.7 (2005)(controversy "remains live" where a party "continues to oppose" the judgment of the State's highest court and "will petition this Court for a writ of certiorari").

Second, as in *ASARCO*, the decision of the Maryland high court interpreting federal constitutional law imposes upon the State of Maryland "a defined and specific legal obligation," *id.* at 618, which "is in effect a declaratory judgment," *Richardson v. Ramirez*, 418 U.S. 24, 35 (1971), preventing the State's social services agencies and its juvenile courts from compelling a parent to disclose the location of a missing child who is under the protective jurisdiction of the juvenile court. "By reason of the special relationship of the public officials in a State to the court of last resort of that State," the decision below, "if left standing, leaves them permanently bound by its conclusion on a matter of federal constitutional law." *Id.* These "valuable legal rights" will be "directly affected to a specific and substantial degree" by the decision of this Court.

Finally, the decision below is unquestionably a "final judgment altering tangible legal rights," which arises from proceedings that were "judicial in nature." *ASARCO*, 490 U.S. at 619. The Maryland Court of Appeals rendered its decision based on a set of concrete facts pertaining to respondent Teresa B., which arose from the specific context of Child in Need of Assistance proceedings instituted for the protection of her child, Ariel G. Thus, as

in *ASARCO*, the State court judgment to be reviewed here is by no means "an abstract determination" or "an advisory opinion rendered through specific mechanisms for obtaining a hypothetical ruling. . . ." *Id.*

The Court of Appeals did not purport to issue an advisory opinion, but instead decided the specific controversy placed before it based on its determination that the case remained justiciable under applicable Maryland law, even though Teresa B. had already been "released from the imprisonment brought about by the contempt." (App. 4a, n.4.) Furthermore, the applicable precedent on which the Court of Appeals relied, *see* App. 4a n.4 (citing *Droney v. Droney*, 102 Md. App. 672, 681-82, 651 A.2d 415, 419-20 (1995)), rejects the proposition that such an appeal is moot and, therefore, directly refutes Teresa B.'s suggestion that the lower court proceeded to decide this case interpreting federal constitutional law "despite its mootness," Br. in Opp. at 11. As *Droney* expressly held, an appeal from a contempt order that is no longer in effect remains viable, the party held in contempt "remains entitled to seek exoneration," and "the issues pertaining to the contempt itself . . . are not moot." *Id.*, 102 Md. App. at 682, 651 A.2d at 419-20.

Therefore, the petition here meets all of this Court's requirements for a justiciable case or controversy.

2. The Controversy Is Capable Of Repetition, Yet Evading Review.

While satisfaction of the criteria set forth in *ASARCO* will suffice to support this Court's jurisdiction, respondent's suggestion of mootness should also be rejected because the conduct that gives rise to this case is, regrettably, "capable of repetition, yet evading review,"

and, therefore, the case is not moot. *See Honig v. Doe*, 484 U.S. 305, 318 (1988).

As the record shows, the child Ariel G. suffers from a chronic medical condition, severe asthma, that went without proper treatment when he was under the care of his mother, Teresa B. (App. 2a.) Placed under the protective jurisdiction of the juvenile court, Ariel G. twice disappeared from foster care. (App. 2a-4a.) He was missing for three and a half years, from the fall of 1996 through March 2000 (App. 2a), and was again missing for more than a year and a half, from January 2001 until the fall of 2002. (App. 3a-4a). In each of these instances, the juvenile court questioned Teresa B. in an effort to find her missing child, but she refused to disclose the child's location and invoked the Fifth Amendment privilege against self-incrimination. (App. 2a, 3a.) Given the chronic nature of Ariel G.'s medical condition, the history of repeated and prolonged disappearances from foster care, and Teresa B.'s persistent refusal to disclose his location, there is at least a "reasonable expectation" that this controversy will recur. *Honig v. Doe*, 484 U.S. at 318 n.6. It can also be expected to evade review, as evidenced by the fact that only one of the multiple contempt orders directed at Teresa B. over the long course of these proceedings was ever subjected to appellate review (App. 4a, 4a n.5, 28a.), and as she now argues, even that order should escape this Court's review. For these additional reasons, this case is not moot.

3. Important Interests Counsel Against A Determination Of Mootness In This Case.

Especially in light of this case's impact on the ability of the State to provide critical State services for the

protection of children, significant interests recognized by this Court "militate against a conclusion of mootness in this case." *Richardson v. Ramirez*, 418 U.S. at 36. First, under the Supremacy Clause and 28 U.S.C. § 1257, a "predominant interest" is "to assure that the binding application of federal law is uniform and ultimately subject to control by this Court," in part by "assuring 'that state courts will not be the final arbiters of important issues under the federal constitution.'" *ASARCO*, 490 U.S. at 621 (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). That interest would be thwarted by a finding of mootness here, which would permit Maryland's court of last resort, "'quite contrary to the intention of Congress in enacting 28 U.S.C. § 1257,'" to decide a federal constitutional question "'without any possibility of state officials who were adversely affected by the decision seeking review in this Court.'" *ASARCO*, 490 U.S. at 622 (quoting *Richardson v. Ramirez*, 418 U.S. at 42 n.13).

Here, this interest weighs all the more heavily against mootness and in favor of review, because the pending petition represents the State's last opportunity to seek relief from the Maryland court's declaration of federal constitutional law, which imposes an ongoing restraint upon the State's ability to find and protect missing children who are at risk. *See* Petition at 11-12. As this Court has recognized, this situation places the State in a bind that presents even "stronger arguments for concluding that a live case or controversy remains" than might be true in other cases. *Richardson v. Ramirez*, 418 U.S. at 35. That is, without further review by this Court, "in view of the [Maryland Court of Appeals'] decision against the state officials and their obligation to follow the law as laid down by that court," *id.*, the federal constitutional issue raised in the petition would effectively become "'*incapable* of

repetition,' and therefore evading review," *id.* (emphasis added).

Finally, rejecting Teresa B.'s mootness argument also serves this Court's expressed "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review," which "counsels against a finding of mootness here." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (1997). Ordinarily, a party asserting that a controversy has become moot since the rendering of a judgment below "bears the burden of coming forward with the *subsequent* events that have produced that alleged result." *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 98 (1993)(emphasis added). In this case, none of the events cited by Teresa B. to show mootness occurred *subsequent* to the favorable decision she won below in the State court. Instead, her mootness argument is based on two *prior* events, which Teresa B. characterizes as "BCDSS's abandonment of its efforts at compulsion" once the missing child was found, and "the concomitant release of Ms. B." Br. in Opp. at 14. Each of those events occurred well before the Court of Appeals issued its decision. (App. 4a, 4a n.4.) Yet, in the State court proceedings, neither Teresa B. nor any other party asserted that the case was moot. This Court should reject Teresa B.'s effort to prevent further review, which is based on the same state of facts that existed when she prevailed in the court below.

B. Respondent's Other Arguments Do Not Warrant Denial Of Review.

Teresa B.'s other arguments in opposition to the petition should also be rejected as insufficient bases for denying review.

Respondent's second argument, that "the Court of

Appeals was correct," Br. in Opp. at 15, is merely a repetition of her argument on the merits, which prevailed in the court below. That argument repeats the Court of Appeals' misreading of this Court's decision in *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990), which is addressed in the petition at pages 7-10 and 12-16. Otherwise, Teresa B. relies entirely on decisions arising from criminal prosecutions that did not involve civil proceedings for the protection of children. Thus, at most, her argument merely demonstrates that there is disagreement about the meaning and proper application of this Court's precedents, which should be clarified by further review in this case.

Teresa B.'s third argument, that there is "no conflict of authority," Br. in Opp. at 27, simply fails to acknowledge the conflicting result reached in a reported decision by Massachusetts' court of last resort. Unlike the Maryland court below, the Massachusetts court affirmed multiple contempt orders compelling a parent to disclose a missing child's location, notwithstanding the parent's assertion of the Fifth Amendment privilege against self-incrimination. *See In the Matter of a Care and Protection Summons*, 770 N.E.2d 456, 467, 467 n.24 (2002). *See* Petition at 22-23, 23 n.14.

In any event, in this case involving "an important question of federal law" that "has not been, but should be, settled by this Court," which has been decided by the court below "in a way that conflicts with" this Court's precedent, Sup. Ct. R. 10(c), the need for further review should not turn upon either party's parsing of the Massachusetts decision. As explained in the brief filed by *amici curiae* Alabama and twenty other States in support of this petition, "where, as here, (i) the [Maryland] high court seems so convinced of its reading of *Bouknight*, and (ii) 21 States

are equally convinced that the court has fundamentally misunderstood *Bouknight*, the scope of this Court's decision is in need of clarification." Br. of *Amici Curiae* States of Alabama, *et al.* at 6.

For these reasons, Teresa B.'s arguments should not be permitted to deny review of the important federal constitutional question presented by this case.

Finally, though it is not raised as a distinct argument against review, the Brief in Opposition also suggests for the first time, and without citation to any authority, that "unlike production of the child by the custodian, compelled oral testimony is not . . . even authorized" by Maryland's "legislative scheme." Br. in Opp. at 26. That argument, which was neither raised below nor addressed by the Court of Appeals, is incorrect as a matter of law.

The pertinent provision in Maryland's statutory scheme for the protection of Children in Need of Assistance (CINA) authorizes the juvenile court to "issue an appropriate order directing, restraining, or otherwise controlling the conduct of a person who is properly before the court, if the court finds that the conduct: (1) [i]s or may be detrimental or harmful to a child over whom the court has jurisdiction," or "(2) [w]ill tend to defeat the execution of an order or disposition made or to be made" in a CINA proceeding. Md. Code Ann., Cts. & Jud. Proc. § 3-821(a)(1) and (a)(2). (App. 75a.) Such an order is enforceable through the court's contempt powers. *Id.*, § 3-821(c). (App. 75a.) Nothing in the statute purports to prevent a juvenile court from exercising its authority to compel a parent to cooperate in the search for a missing child who is under the court's protective jurisdiction, whether by producing the child or by disclosing the child's last known location.

Therefore, Teresa B.'s objections to further review are without merit.

CONCLUSION

For the reasons stated, this Court should reject the arguments of the respondent and issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland. Following review, the judgment should be reversed.

Respectfully submitted,

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